***THE HON'BLE SRI JUSTICE BILAL NAZKI**

AND

THE HON'BLE SRI JUSTICE Ch.S.R.K.PRASAD

+WRIT PETITION NO. 20629 OF 2004

% 09-12-2004

Between:

Pabba Yadagiri.

..... PETITIONER

AND

The Collector and District Magistrate, Nalgonda & 2 others.

.....RESPONDENTS

For the Appellant : MR.C.PRAVEEN KUMAR, Advocate.
For the Respondents : THE ADVOCATE GENERAL.

< Gist:

> Head Note:

? CITATIONS:

1. (1995) 4 scc 51.
2. AIR 2000 SC 2504.
3. 1996 SCC (Crl) 269.

C/15

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE NINTH DAY OF DECEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI

and
THE HON'BLE MR JUSTICE Ch.S.R.K. PRASAD

WRIT PETITION NO : 20629 of 2004

Between:

Pabba Yadagiri, S/o Malsuraiah,
R/o Shettipalem, Vemulapalli Mandal, Nalgonda District

..... PETITIONER

AND

1 The Collector and District Magistrate, Nalgonda

2 The Government of Andhra Pradesh rep.by its Chief Secretary, Hyderabad
3 The Superintendent of Central Prison, Cherlapally

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ or Habeas Corpus under Art.226 of the Constitution of India directing the respondents to produce the detenu Sri Rachakonda Srinivasa Rao, S/o Chalamaiah, now detained in Central Prison, Cherlapally, before this Hon'ble Court and he may be ordered to be released forth with after declaring his detention as illegal and void.

Counsel for the Petitioner : MR.C.PRAVEEN KUMAR

Counsel for the Respondents : THE ADVOCATE GENERAL

The Court made the following :

ORDER : (per Hon'ble Sri Bilal Nazki, J)

This Writ Petition has been filed by the petitioner on behalf of Sri Rachakonda Srinivas Rao (hereinafter referred to as 'the detenu'), who has been detained and is lodged in Central Prison, Cherlapalli.

The detenu has been detained by an order dated 28.08.2004 in terms of Section 3 of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (hereinafter referred to as 'the Act'). The Collector & District Magistrate, Nalgonda, ordered the detention and communicated the grounds of detention to the detenu. There are as many as 10 grounds in the grounds of detention and the order of detention has been challenged on various

counts. One of the grounds for challenging the order of detention is that the detenu had not been informed that he had a right to make a representation to the detaining authority against the order of detention. This fact is not disputed and we have perused the records. The records also do not reveal that the detenu was informed that he had a right to make a representation to the detaining authority against the detention. At the end of the grounds of detention, the detaining authority informed the detenu;

> *"1. You have a right to make representation against this order of detention to the Chief Secretary, Government of Andhra Pradesh, A.P., Hyderabad.*
>
> *2. The matter will be referred to the Advisory Board with in three weeks of the date of Detention. You have a right to make a representation in writing to the said Advisory Board. You have also a right to be heard in person before the Advisory Board Meets to consider the matter. As such hearing of the Advisory Board you have a right to take the assistance of any person of your choice, such person not being a legal practitioner."*

The learned Senior Counsel appearing for the petitioner submits that the Government or the Advisory Board would consider the representation of the detenu at a subsequent stage and the detenu had a right to make a representation against the order of detention at the earliest point of time, if he had been informed that he had a right to make a representation to the detaining authority. The learned Government Pleader appearing for Advocate General however, submits that since the detenu had been informed that he has a right to make a representation to the Chief Secretary as well as to the Advisory Board therefore, he does not get prejudiced if the detaining authority failed to inform the detenu that he had a right to make a representation to the detaining authority, that would not vitiate the detention.

The learned Senior Counsel for the petitioner however, submits

that this question is not *res integra* and has already been decided by a Constitutional Bench of the Hon'ble Supreme Court. He further submits that since Article 22 of the Constitution of India gives a right to the detenu to make a representation to the detaining authority, such a right cannot be compromised in any circumstances. He refers to a judgment reported in *Kamleshkumar Ishwardas Patel v. Union of India & others*. This is the judgment by a Constitutional Bench of the Supreme Court. The question that was posed by the Court for an answer to itself was,

> "*When an order for preventive detention is passed by an officer especially empowered to do so by the Central Government or the State Government, is the said officer required to consider the representation submitted by the detenu ?*"

Then the Supreme Court went on to answer this question and observed,

> *"The question posed has to be considered in the light of the provisions relating to preventive detention contained in Article 22 of the Constitution as well as the provisions contained in the relevant statutes."*

The Supreme Court noted that Article 22(5) envisages that whenever a person is detained in pursuance of an order of preventive detention, the authority making such order, shall communicate to such person as soon as may be, the grounds on which the order has been made and shall also afford him the earliest opportunity of making a representation against the order. After analyzing the law laid down by the Supreme Court earlier, in Para 14, it held;

> *"14. Article 22(5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order for detention and thereby give relief*

to the person detained. The right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation."

Therefore, on the strength of Article 22(5) of the Constitution of India and on the basis of the law laid down by the Supreme Court in this judgment, it can be safely said that the authority who makes the order of detention is under an obligation to inform the person detained of his right to make a representation against the order of detention.

The only question which remains to be answered is whether the Collector who passed the order of detention was competent to revoke the order of detention in case he agreed with the representation made by the detenu. The Supreme Court was considering Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA Act") and Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (for short "the PIT NDPS Act") and it held that in view of Section 21 of the General Clauses Act, the authority which has made the order of detention, is competent to revoke the said order.

In the light of these observations of the Supreme Court, a look at the Act is necessary.

Section 3 lays down;

*"**3. Power to make orders detaining certain persons:--** (1) The Government may, if satisfied with respect to any bootlegger, dacoit, drug-offender, goonda, immoral traffic offender or land-grabber that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained."*

Section 8(1) lays down;

"***8. Grounds of order of detention to be disclosed to persons affected by the order :--*** *(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but, not later than five days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the Government."*

Section 9(1) reads;

*"**9. Constitution of Advisory Boards :---** (1) The Government shall whenever necessary, constitute one or more Advisory Boards for the purposes of this Act."*

Section 10 reads;

*"**10. Reference to Advisory Board:---** In every case where a detention order has been made under this Act, the Government shall within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by them under Section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of Section 3."*

Therefore, under Section 8(1) of the Act, grounds of order of detention are to be disclosed to the persons affected by the order, within five days of the date of detention. A reference to the Advisory Board constituted under Section 9 of the Act, has to be made under Section 10 of the Act within three weeks from the date of detention of the person under the order.

Section 14(1) lays down;

*"**14. Revocation of detention orders:---** (1) Without prejudice to the provisions of Section 15 of the Andhra Pradesh General Clauses Act, 1891 a detention order may, at any time, be revoked or modified by the Government notwithstanding that the order has been made by an officer mentioned in sub-section (2) of Section 3."*

Almost similar provision is contained in Section 11 of the COFEPOSA Act, which was under consideration before the Supreme Court. In para 47, the Supreme Court, while upholding the order of Madras High Court, held;

> *"47. In both the appeals the orders of detention were made under Section 3 of the PIT NDPS Act by the officer specially empowered by the Central Government to make such an order. In the grounds of detention the detenu was only informed that he can make a representation to the Central Government or the Advisory Board. The detenu was not informed that he can make a representation to the officer who had made the order of detention. As a result the detenu could not make a representation to the officer who made the order of detention. The Madras High Court, by the judgments under appeal dated 18-11-1994 and 17-1-1994, allowed the writ petitions filed by the detenus and has set aside the order of detention on the view that the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority himself has resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution. In view of our answer to the common question posed the said decisions of the Madras High Court setting aside the order of detention of the detenus must be upheld and these appeals are liable to be dismissed."*

We have already mentioned certain provisions of the Act. When an order of detention is made by an officer authorized under Section 3(2) of the Act, it is only the authority who passed the order of detention, who is seized of the matter and who is privy to the matter. After the detention order is passed by the officer, the matter goes to the Government and the Government has no power to intervene in the matter unless the matter is considered by the Advisory Board. Under Section 10 of the Act, the Government has three weeks time to refer the matter to the Advisory Board. After the opinion of the Board is available to the Government, then in terms of Section 12 of the Act, the Government is supposed to take action upon the report of the Advisory Board and if the Board gives an opinion that there is

sufficient cause for the detention of the person, the Government may confirm the detention and continue the detention of the person concerned for such period not exceeding the maximum period prescribed under Section 13 of the Act. And in terms of Section 12(2) of the Act, if the Advisory Board expresses the opinion that no sufficient cause for detention of the person concerned was there, the Government is bound to revoke the detention order and cause the person to be released forthwith. So, from the date of passing of the order of detention till the Government acts on the opinion of the Board in terms of Section 12, the formal authority to consider the representation, is the detaining authority. Therefore, it is not correct as argued by the learned Counsel for the respondents that since a representation could be made to the Government therefore no prejudice was caused to the detenu.

The learned Counsel has also relied on another judgment of the Supreme Court in *State of Maharashtra and others V. Santosh Shankar Acharya*. Similar question was decided in this case also and the Supreme Court observed that non-communication of the fact to the detenu that he has a right to make a representation to the detaining authority would constitute an infraction of a valuable right of the detenu under Article 22(5) of the Constitution and such failure would make the order of detention invalid.

The learned Senior Counsel for the petitioner has also relied on another judgment of the Apex Court in *Nutan J.Patel (Ms) Vs. S.V.Prasad and another*. This case was more similar to the present case because, the detenu had been informed that he was at liberty to make a representation to the State Government, Central Government or to the Advisory Board, but the Supreme Court found that it was not sufficient compliance of Article 22(5) of the Constitution of India. In para 4, it held;

> "*4. In relation to the detention of the detenus in Criminal Appeals Nos.850 and 915 of 1994 under PIT NDPS Act, the Madras High Court allowed the writ petition and set aside the order of detention on the ground that the detenus were not informed of their constitutional right to make a representation to the detaining officer*

and it vitiates the right guaranteed under Article 22(5) of the Constitution. The Court had upheld the above view. It is seen that the detenu was informed on 20-4-1992 that he was at liberty to make a representation to the State Government, Central Government and to the Advisory Board. It was asserted that he made a representation through the prison authorities to the Government of Andhra Pradesh. In other words, from these facts, it would be clear that the detenu was not informed of his constitutional right to make a representation to the Special Officer for reconsideration of his detention. In view of the law laid down by this Court, the failure on the part of the Specified Officer to inform the detenu that he has a constitutional right to make representation to the Specified Officer against the order of detention, violates Article 22(5) of the Constitution. The order of detention gets vitiated."

For the reasons given hereinabove, we allow the Writ Petition, quash the order of detention and order the release of detenu forthwith if he is not required in any other case. Since we have quashed the order of detention on one ground alone therefore, it is not necessary to deal with the other grounds agitated by the Senior Counsel. No order as to costs.

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(BILAL NAZKI, J)

9th December, 2004.

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(Ch.S.R.K.PRASAD, J)

N.B:-

L.R. Copies to be marked.

(B/o)

ajr

One Fair Copy to Hon'ble Sri Justice Bilal Nazki, for his Lordship's kind perusal.

One Fair Copy to Hon'ble Sri Justice Bilal Nazki, for his Lordship's kind perusal.

To

1 The Collector and District Magistrate, Nalgonda

2 The Chief Secretary, Government of Andhra Pradesh, Hyderabad
3 The Superintendent of Central Prison, Cherlapally

4 Two C.Cs. to the Advocate General, High Court buildings, Hyderabad (OUT).

5 Two C.D. copies.

6 8 L.R. Copies.

7 The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi.

8 The Secretary, A.P.Advocates Association Library, High Court Buildings, Hyderabad.

That Rule Nisi has been made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, the Chief Justice on this the 9th day of December, two thousand four.